

G.DileepAmuthan v. Presidential Secretariat

RTIC Appeal (In person)/114/2017 Order under Section 32 (1) of the Right to Information Act, No 12 of 2016 and Record of Proceedings under Rule 28 of the Right to Information Rules of 2017 (Fees and Appeal Procedure) - heard as a part of the formal meeting of the Commission on 03.04.2018, 15.05.2018, 03.07.2018, 07.08.2018, 09.10.2018)

Record of the proceedings and order delivered on 13.11.2018

Chairperson: Mr. Mahinda Gammampila

Commission Members: Ms. Kishali Pinto-Jayawardena

Mr. S.G. Punchihewa

Dr. Selvy Thiruchandran

Justice RohiniWalgama

Present: Director-General Mr. Piyathissa Ranasinghe

Appellant: Mr. Dileep Amuthan

Notice issued to: B.K.S. Ravindra, Additional Secretary to the President

Appearance/ Represented by:

Appellant - Mr. Dileep Amuthan

PA - Mrs. Luckshmi Jayawickrema, Additional Secretary (Legal)

RTI Request filed on:	09.05.2017
IO responded on:	25.05.2017
First Appeal to DO filed on:	23.06.2017
DO responded on:	No response
Appeal to RTIC filed on:	28.09.2017

Brief Factual Background:

Through an information request dated 09.05.2017 the Appellant requested the following information from the PA.

1] 1. How many times has President Rajapaksa travelled to the Northern Province when he was President between 2010 and January 7th, 2015? 2. The dates of each such travel.

2] 1. How many times has President Sirisena travelled to Northern Province from 9th January 2015 to 10th March 2017? 2. The dates of each such travel.

3] 1. How many times has President Sirisena travelled abroad between January 9th 2015 to March 10th 2017? 2. Dates of each travel.

4] 1. How many times has President Rajapaksa travelled abroad since 1st December 2005 till January 8th, 2017? 2. Dates of such travel.

By response date 25.05.2017 the Information Officer (IO) denied the information citing Section 5 (1) (b) (i) of the RTI Act No.12 of 2016 which states,

5. (1) Subject to the provisions of subsection (2) a request under this Act for access to information shall be refused, where–

(b) disclosure of such information–

(i) would undermine the defence of the State or its territorial integrity or national security;

The Appellant then appealed to the Designated Officer (DO) on 23.06.2017 but received no response. Thereafter he appealed to the RTI Commission on 28.09.2017.

Matters Arising during the Hearing

In its written submissions dated 04.05.2018, the PA argued that in his appeal to the Designated Officer (DO) on 23.06.2017 the Appellant had only referred to the response made to his information request regarding item 3. The Appeal had been acknowledged on 13.07.2017 but no response had been provided by the DO. The PA submitted therefore that the Appellant could not have appealed on the other requests for information since they were only replied to on 18.01.2018 and that, as seen by the different numbers given to each of the appeals by the Appellants, these had been in response to different appeals filed on each of the four items rather than one appeal containing four information requests as sought to be claimed by the Appellant.

Responding to this claim at the hearing held on 15.05.2018, the Appellant submitted that he had filed all four information requests together by information requests dated 09.05.2017 and had appealed against all four requests in his appeal to the DO dated 23.06.2017 after assuming that the response sent by the IO related to all four appeals. He further submitted that he had sent all four information requests dated the same date (09.05.2017) by one cover and by registered post to the PA on 10.05.2017 and could later provide the registered postal article receipt which was not in his possession currently.

In order to resolve this confusion the Commission directed the Appellant to produce the registered postal article receipt of the said information requests to the Public Authority. Nonetheless, the Commission observed that the absence of a response by the IO and/or the DO under and in terms of Sections 25(1) and 31(3) and the failure to adhere to the time limits specified therein amounts to an infringement of the said sections against which an appeal may be lodged to the Commission under and in terms of the Act.

Order

On the facts before us, it appears that the varying exemptions have been cited by the Public Authority (PA) to refuse the information requested in this appeal.

In the first instance, the IO had refused the information under Section 5 (1) (b) (i) which stipulates that the disclosure of information undermines “the defence of the State or its territorial integrity or national security.”

Later, (RTIC Minute of the Record, 3rd April, 2018) the PA took up the exemption of parliamentary privilege as provided for under section 5 (1) (k) of the Act. It was also contended that the information was not within the ‘possession, custody and control’ of the Public Authority in terms of Section 3 of the Act as security considerations meant that the Public Authority did not keep the relevant records thereof.

In relation to items 1 & 4 of the information request which related to the travel details of the former President of Sri Lanka, the PA submitted that it did not have in its possession the travel details of the former President as, during that period, even the PA was unaware of most of the travel details. It was further noted that the PA was unaware of who handled the travel details during that period (2005 - 2015).

In regard to the exemption raised by the IO (namely 5 (1) (b) (i)), we take note of the submission of the PA that disclosing the movements of the President relating to official activities may undermine the defence of the State as well as national security thus attracting the exemption under Section 5 (1)(b) (i).

On perusal of the requested information however, it is evident that what has been requested for are the travel details of the President in relation to the past; ie; (Item No 2) 1. How many times has President Sirisena travelled to Northern Province from 9th January 2015 to 10th March 2017? 2. The dates of each such travel; Item No 3) 1. How many times has President Sirisena travelled abroad between January 9th 2015 to March 10th 2017? 2. Dates of each travel.

Indeed it would appear that this information would be ordinarily available as a matter of public record if newspaper reports relevant to the date are scrutinized. In that context, we conclude that the exemption in Section 5 (1)(b) (i) will not apply to deny the information requested.

In regard to the exemption of privacy under Section 5 (1) (a) of the Act that has been raised by the PA, this has been rationalised by the PA on the basis that if such personal information is disclosed, it would amount to an unwarranted invasion of the privacy of the individual i.e. the President. However, what has been requested here is pure statistical data. The claim of privacy will not arise in that context, given that it must be established by the PA that this relates to personal information ‘that has no relationship to any public activity or interest’

The exemption of privacy stipulated by Section 5 (1) (a) cannot be maintained therefore as the information requested pertains to details of travels undertaken by the President *qua* president. In *Dinesh Berry v. BPCL* (Appeal no.07/IC (A)/CIC/2006), it was observed that travel expenses incurred by public servants cannot be treated as personal information. Given that higher levels of accountability is expected of elected officials the exemption of privacy cannot be pleaded for acts of the President done in his official capacity.

We find that the exemption of Section 5(1)(a) is inapplicable to deny the information.

The PA also submitted that the information is debarred by operation of the Parliament (Power and Privileges) Act No.21 of 1953 read with Article 32 (3) of the Constitution. It was contended that a Member of Parliament includes the President, Speaker or any Member presiding in Parliament or Committee. As such, all the immunities mentioned in Part I of the above Act applied to the Members of Parliament as well as to the President. Thus exemption 5 (1) (k) would thereby apply.

Article 32 (3) of the Constitution states that;

‘The President shall, by virtue of his of office attend Parliament once in every three months. In the discharge of this function, the President shall be entitled to all the privileges, immunities and powers of a Member of Parliament, other than the entitlement to vote, and shall not be liable for any breach of the privileges of Parliament or of its members.’

This Commission reiterates its previous position that as per Article 32 (3) of the Constitution, the privileges applying to a Member of Parliament is applicable to the President only ‘in the discharge of this function’ (viz; attending Parliament). Further, Parliamentary Privileges are not applicable to travel details of Parliamentarians. Public funds are being used for such travel and hence Parliamentarians too should be accountable to the Public regarding the use of such funds. (Minutes of the RTIC Record, 03/04/2018 & 15.05. 2018)

The final position that the PA took to deny the information was on the basis that, due to security reasons, it did not maintain a file or register or any kind of official records regarding the travels of the President and could not be expected to maintain records of such high security information. Therefore, the PA submitted that such information is not in its ‘possession, custody or control; as required by Section 3 of the RTI Act (Minute of the RTIC Record, 15.05. 2018)

At the time that this explanation was provided by the PA, it was informed that if this claim that the requested information is not within its ‘possession, custody or control’ under Section 3 (1) of the Act was maintained, a consequential question arises as to who then provides the funds allocations for such travel (Minute of the Record, 15/05/2018). Clarifying its position at the next hearing into this appeal, the PA claimed that there is no separate allocation for the above but that a general allocation from the Treasury is made to carry out the functions of the President, for

security and to maintain Presidential fund etc. It further stated that if there is a request for funds, it had to be first approved by the Chief Financial Officer (CFO) of the PA.

In response this Commission observed that since the PA has clarified that the Chief Financial Officer (CFO) of the PA is responsible for allocations made for various purposes as and when required and in order to substantiate the contention of the PA that it does not have required information in its 'possession, custody and control' (vide Section 3 of the RTI Act) in law, the Commission has a statutory duty to ascertain if the CFO has in fact, approved/set aside allocations for travel details during the period asked for;

No. 2 of the Information Request - Dates of travel by President Maithripala Sirisena to the Northern Province from 9th January 2015 to 10th March 2017;

No. 3 of the Information Request - Dates of overseas travel by President Maithripala Sirisena between January 9th 2015 to March 10th 2017;

The PA was directed to obtain a certification from its CFO as to whether allocations were made for the above purposes during the period stated above or not, as the case may be. (Minute of the Record, 03.07, 2018)

At the final hearing held on 09.10.2018, the PA handed over a letter signed by the Secretary to the President dated 09.10.2018 stating that the information requested by the Appellant is not in the possession, custody or control of the Authority as no details in relation to the travel details of the President financial or otherwise is documented owing to concerns regarding the security of the President.

In assessing the above explanations provided by the PA, we note the following as of record in pursuance of our duty in terms of the preamble to the RTI Act as the statutory appellate body established under the Act, to 'foster a culture of transparency and accountability in Public Authorities.'

The President of Sri Lanka is an elected public official for whom public funds are made available for use in his official capacity as President. The importance of maintaining public transparency regarding the expenditure of public funds is the golden thread underlying Sri Lanka's RTI Act and indeed, all RTI Acts. As pointed out in *Thalappalam Service Co-operative Bank Ltd. v. Union of India (UOI) and Ors.*, (W.P. (C.) No. 18175 of 2006)

"Funds which the Government deals with are public funds. They essentially belong to the sovereign, "We, the People". The collective national interest of the citizenry is always against pilferage of national wealth. This includes the need to ensure complete protection of public funds."

The Commission urges that required mechanism to be put in place by the relevant public authorities for the auditing of such expenses so that all such expenditure is held accountable forthwith.

During the hearings of this appeal, the PA noted that the Treasury makes a general allocation for the functions of the President, including his security, travel, maintenance of the Presidential fund etc. It further stated that if there is a request for funds it had to be first approved by the Chief Financial Officer (CFO) of the Presidential Secretariat.

The existence of such established protocols makes a claim regarding the absence of documentation on the travel expenses of the President due to security reasons go to the very root of the issue of accountability. Not only has the PA taken the position that this information is not within its 'possession, custody or control' but also that it is entirely unable to refer the Appellant to the relevant state entity actually having such information in its 'possession, custody or control' within the meaning of Regulation 4, Clause 6 of the RTI Regulations (gazetted under Gazette No. 2004/66 dated 03.02.2017).

It is also of interest that this position was not initially taken by the PA which instead chose to decline giving the information under Section 5 (1)(b) (ii) thus raising the inference as to whether this was cited at a point only when it became clear that the other exemptions raised by the PA were determined as being inapplicable by us. The information asked for in this information request was initially refused by the IO on the basis of Section 5 (1) (b) (ii) of the RTI Act. Further, multiple exemptions were pleaded by the PA over the course of the five appeal hearings that were held before this Commission. We fail to see the reason as to why such a determined effort has been made to deny public information which should legitimately be of record. Provision of mere statistics regarding the travel details of the first citizen of this country in his official capacity as President and that too, in relation to past travel need not to have been attended with this degree of secrecy.

Moreover, it must be noted that the global trend with regard to travel expenses of heads of state is increasingly towards full disclosure. For instance, in both Canada and New Zealand, the travel and hospitality expenses of their heads of state and several other high ranking government officials are available for public access on their respective official websites.

In the United States while extensive information regarding the travel details of the US Presidents is available in the public domain, there is also clear jurisprudence where the Freedom of Information Act has been used to obtain information regarding travel expenses of the President (*Judicial Watch v. U.S. Dept. of Homeland Security* (No. 1:17-CV-01007)), (*Judicial Watch v. U.S. Department of Homeland Security* (No. 1:15-CV-01983)), (*Judicial Watch v. U.S. Dept. of Homeland Security* (No. 1:17-CV-01341)).

This illustrates that the global trajectory in relation to travel expenses of elected and public officials is towards full and/or proactive disclosure. While it is imperative for the use of public

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funds in this manner to be closely monitored in order to ensure accountability of public authorities, it is also prudent for Sri Lanka to keep pace with regional and international counterparts in terms of full and proactive disclosure of travel expenditure of elected and high ranking public officials, as this would be fundamental to the ethos of the RTI regime.

The Appeal is concluded. Given that the information requested by the Appellant is stated on record by the Public Authority as not being in its 'possession, custody or control' in terms of Section 3 of the RTI Act, the Commission is not in a position to fulfill the request of the Appellant.

Order is directed to be conveyed to both parties in terms of Rule 27 (3) of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017).

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Mahinda Gammampila – Chairman

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Kishali Pinto – Jayawardena – Commissioner

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S.G. Punchihewa – Commissioner

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Dr. Selvy Thiruchandran – Commissioner

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Justice R. Walgama - Commissioner